STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of B. V. BROOKS, BROOKS, TORREY & SCOTT, INC., RAINBOW CAPITAL, INC., WESTBROOK, INC., AND WESTFAIR, INC.	:	DETERMINATION DTA NOS. 808653, 808654, 808655, 808657 AND 808658
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners, B. V. Brooks, Brooks, Torrey & Scott, Inc., Rainbow Capital, Inc., Westbrook, Inc. and Westfair, Inc., c/o Michael D. Blaymore, Esq., 97 Powerhouse Road, Suite 102, Roslyn Heights, New York 11577, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A consolidated hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 13, 1991 at 9:30 A.M., with all briefs to be submitted by September 30, 1991. Petitioners filed their brief on June 25, 1991, the Division of Taxation responded with its brief on August 6, 1991, and petitioners filed a reply brief on September 27, 1991. Petitioners appeared by Salamon, Gruber, Newman & Blaymore, P.C. (Michael D. Blaymore, Esq., of counsel) and by Howard M. Koff, P.C. (Howard M. Koff, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioners' transfers of some 77 unimproved residential lots in a residential

subdivision were properly aggregated by the Division of Taxation and subjected to gains tax.

FINDINGS OF FACT

Petitioner Brooks, Torrey & Scott, Inc. ("BT & S") was incorporated on January 16, 1943, under the name Brooks, Inc., in the State of Connecticut. The name of the corporation was later changed to its present name. This corporation is engaged in business as a real estate broker, owner and manager. For several years prior to 1981, all of the stock in this corporation was owned by petitioner B. V. Brooks. However, in or about 1981, B. V. Brooks changed the stock ownership of BT & S such that he owned 28 of the 100 issued and outstanding shares of stock, with the balance of such stock owned in equal amounts (24 shares each) by each of petitioner B. V. Brooks' children, Torrey Brooks, Scott Brooks and Wendy Brooks.

Petitioner Westfair, Inc. ("Westfair") was incorporated on May 12, 1942 under the laws of the State of Connecticut. This corporation is engaged in the business of owning and operating commercial real estate. For several years prior to 1981, its stock was owned entirely by petitioner B. V. Brooks. In or about 1981, the stock ownership of this corporation was changed such that B. V. Brooks owned 9 shares of the 30 issued and outstanding shares of Westfair, with the balance of such stock owned in equal amounts (seven shares each) by each of petitioner B. V. Brooks' three above-named children.

Petitioner Westbrook, Inc. ("Westbrook") was incorporated on January 18, 1952, under the name of Weitbrook, Inc., in the State of Connecticut. The corporation's name was changed to Westbrook, Inc. on March 5, 1984. This corporation is engaged primarily in owning and operating real estate and in operating a travel agency. Prior to 1981, the stock of Westbrook was owned entirely by petitioner B. V. Brooks. However, in or about 1981, the stock ownership was changed such that petitioner B. V. Brooks retained ownership of 27.5% of the issued and outstanding shares of stock, with the balance of such stock owned equally (24.17% of such stock) by each of petitioner B. V. Brooks' three above-named children.

Petitioner Rainbow Capital, Inc. ("Rainbow") was incorporated on November 27, 1968, under the name of Rainbow Operating Corp., in the State of New York. The name of the

corporation was changed to Rainbow Capital, Inc. on June 13, 1984. This corporation was described as being maintained as an available corporation for future use. At all times, petitioner B. V. Brooks has owned 100% of the stock of this corporation.

Petitioner B. V. Brooks has been involved in the real estate business, in one respect or another, since approximately 1949. He has, in addition, pursued other ventures, including investment counselling and business consulting. Petitioner B. V. Brooks' father was a real estate developer, and petitioner B. V. Brooks was involved in the real estate business with his father. All of the corporations involved in this matter were, at one time, owned by petitioner B. V. Brooks' father. As part of his estate plan, petitioner B. V. Brooks has arranged for the stock he owns in each of the corporations to be transferred upon his death to his three children Torrey, Scott, and Wendy.

At all times relevant hereto, petitioner B. V. Brooks has held the office of president of each of the corporate petitioners. He was not, however, the only person authorized to sign checks or execute leases or other documents on behalf of the corporations.

The property whose transfer is at issue in this proceeding consisted of all of the lots in a subdivision known as Stuyvesant Manor Park, located in South Setauket, Suffolk County, New York. This subdivision consisted of a total of 92 individual lots, each of which was residentially zoned. At the time of transfer, none of these lots was improved with residences.

Eighty-three of the lots in the subdivision were initially acquired by a corporation known as Mardex Homes, Ltd. on December 19, 1967, with the remaining nine lots in the subdivision acquired by petitioner B. V. Brooks (individually) on April 30, 1968. Thereafter, in June 1971, certain lots were transferred to Audrey Brooks, as well as to Rainbow and to Westfair. The purpose of these conveyances was to "checkerboard" the lots in the subdivision; that is to place any contiguous lots in single and separate ownership (leaving no adjoining lots in common ownership) thereby preserving rights to develop the lots under then-existing zoning rules and avoiding any subsequent up-zoning which might reduce the number of homes which could be built. After such checkerboarding, none (or at least very few) of the lots having common

boundaries were owned by the same person or entity. Petitioner B. V. Brooks testified that such checkerboarding was undertaken upon the advice of petitioners' attorney.

Upon the liquidation of Mardex Homes in 1981, its remaining 36 lots were transferred to B. V. Brooks, its sole shareholder. Prior to the transfer at issue herein, Mr. Brooks made charitable contributions of several lots in the subdivision to Dartmouth College and to Deerfield Academy. In December 1986, several lots were exchanged between B. V. Brooks, BT & S and Westbrook, allegedly for the purpose of taking advantage of favorable income tax rates for 1986. Income tax returns were not submitted nor was it otherwise indicated which person or entity(s) benefited from the favorable income tax rates. One additional lot was transferred, on September 19, 1980, from Westbrook to one Roy A. Foulke, Jr., a long-time family friend of petitioner B. V. Brooks.

With respect to the 1986 transfers between B. V. Brooks, BT & S and Westbrook (see Finding of Fact "9"), transferor and transferee questionnaires were submitted to the Division of Taxation as required under Tax Law Article 31-B ("gains tax"). In connection with these questionnaires, a Statement of No Tax Due was requested (and was apparently issued) upon the position that "consideration was under $1 million" and that "the transfers represent a mere change of identity". An affidavit accompanying these questionnaires, made by petitioner B. V. Brooks and dated December 17, 1986, provides as follows:

> "These are not taxable transfers in that this is a mere change of ownership although the parties in interest are the same, namely, sole stockholder of a corporation changing lots with himself individually."

When this affidavit was presented to Mr. Brooks at hearing, he testified that he had never been the sole stockholder of BT & S, and that statements to that effect on the December 17, 1986 affidavit apparently were made in error.

On or about November 5, 1986, a contract was entered into between B. V. Brooks, Westbrook, BT & S, Westfair, Rainbow, Torrey Brooks, Audrey Brooks, Dartmouth College, Deerfield Academy and Roy A. Foulke, Jr., as transferors (sellers), and John and Salvatore Chiarelli, as transferees (purchasers). This contract was for the sale of all 92 lots in the

Stuyvesant Manor Park subdivision from the described transferors to the Chiarellis. This contract was executed by B. V. Brooks for himself and for all of the corporations, and also by B. V. Brooks for Torrey Brooks as attorney in fact. The contract was executed for each of the other transferors by one Leonard E. Nedlin, attorney in fact. It is noted that one real estate broker was utilized to find a buyer for all of the lots sold, and that one contract was used for the transaction. The brokerage agreement was signed on behalf of all of the corporations by petitioner B. V. Brooks.

On or about November 5, 1987, the transaction closed and the 92 lots were transferred. The transferors' ownership interests were listed as follows:

Number of Lots	Owner
29	B. V. Brooks
20	Brooks, Torrey & Scott, Inc.
4	Westfair, Inc.
5	Torrey Brooks
13	Westbrook, Inc.
6	Rainbow Capital, Inc.
~~77 Lots~~	

The balance of lots were owned by Roy Foulke, Dartmouth College and Deerfield Academy.

While the contract of sale originally provided for payment to be made in part by a purchase money mortgage, the transaction actually closed with full payment made in cash. The $3,000,000.00 purchase price paid by the Chiarellis was apportioned to each transferor based upon dividing $3,000,000.00 by the number of lots sold. B. V. Brooks was the sales proceeds disbursing agent on behalf of each of the transferors. Mr. Brooks noted in testimony that the reason he signed the contract on behalf of all of the corporations was because "we had a requirement that an officer of the corporation sign this document and I was an officer. It was a convenient way to do it." Mr. Brooks added this same explanation for the use of one contract of sale and one broker (i.e., that it was "strictly a matter of convenience"). All of the subject corporations have a common address, to wit, 136 Main Street, Westport, Connecticut.

Initially, the Division of Taxation treated the transfer of all 92 lots as properly subject to aggregation and gains tax was imposed on such basis. Thereafter, upon submission of proof to

the Division of Taxation that Deerfield Academy and Dartmouth College were exempt organizations and that Roy Foulke was an unrelated party, the Division excised the lots sold by these persons from the aggregated total. Furthermore, as the result of information provided at a prehearing conciliation conference, the Division eliminated from inclusion the lots transferred by Torrey Brooks. Finally, petitioners provided additional substantiation for certain costs claimed as part of the original purchase price for the premises, resulting ultimately in partial refunds authorized for all petitioners except Westfair. A reallocation of original purchase price among the transferors resulted in a deficiency of $2,577.38 being assessed against Westfair. Petitioners herein seek cancellation of such deficiency against Westfair, and a refund of gains tax with respect to the other petitioners.

Petitioner B. V. Brooks explained the decision-making process within the various corporations as involving joint decisions made after discussion among the four shareholders, noting that he was not the sole decision maker for any of the corporations. In the same fashion, Torrey Brooks testified that he was an officer of the corporate petitioners and was involved with their operation. He testified that "when an investment opportunity would come up it would be discussed, the pros and cons would be evaluated, and a decision would be made." With respect to the transfers in question, Torrey Brooks testified that:

> "these lots had been sitting around in Long Island for many years, and the market picked up, and the opportunity came to sell them, and I added my opinion that it was a good idea to sell them to raise the money to put into projects closer to home."

Regarding the involvement of petitioner B. V. Brooks' other children (Scott and Wendy), their participation in decision making was described by petitioner B. V. Brooks as essentially talking with them on the phone about the major things proposed to be done.

Petitioners offered in evidence leases, extensions thereto and other documents signed by, among others, Carolyn Fletcher, Rita Hopsicker, Scott Brooks and Torrey Brooks. These documents were offered for the stated purpose of showing that persons other than B. V. Brooks executed documents on behalf of the corporations (see Finding of Fact "6", supra). It is noted that many of such signatures were affixed after the date of the subject transfer.

On January 14, 1982, a restrictive agreement of stockholders was executed relative to each of the three corporations BT & S, Westfair and Westbrook. The stockholders in each corporation were petitioner B. V. Brooks, Torrey Brooks, Scott Brooks and Wendy Brooks. The purpose of the restrictive agreements, as expressed on the second page of each of such agreements, was as follows:

> "Whereas the stockholders and corporation believe it to be in the best interest of all parties hereto [i.e., B. V. Brooks, Torrey Brooks, Scott Brooks and Wendy Brooks] that the stock of the corporation which has, since its organization, been owned and controlled by one or more members of the Brooks family, remain under such ownership and control; and desire hereby to make provisions, in furtherance of such status..." (emphasis added).

On each such agreement, petitioner B. V. Brooks is listed as a resident of Riverside, Connecticut, Torrey Brooks is listed as a resident of Willowby Hills, Ohio, and Scott Brooks and Wendy Brooks are listed as residents of San Francisco, California. Petitioner B. V. Brooks and Torrey Brooks testified at hearing to being residents of Connecticut as of the date of the transfers at issue herein. The specific whereabouts of Scott Brooks and Wendy Brooks as of the date of the subject transfers was not indicated at hearing.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners allege that to aggregate the transfers herein represents "overreaching", citing specifically to Tax Law §§ 1440.7, 1443.1 and 20 NYCRR 590.43(b). Petitioners maintain that the lots were owned individually, that there was no common control and that the transferors were not acting "in concert". Petitioners' case rests almost entirely on their reading of 20 NYCRR 590.43(b) to the effect that "aggregation is not proper where contiguous parcels are sold to one transferee and such parcels are owned by several transferors, notwithstanding the fact that there is one contract between the transferee and the several transferors."

The Division of Taxation argues, by contrast, that aggregation is proper in this matter. The Division maintains that there was an action in concert by the five transferors in this case, arguing that there was a "commonality of purpose and intent" and a "unity of goal" among the transferors. The Division points out that petitioners together are parts of a family real estate operation, headed by a family patriarch, selling parcels in a residential subdivision, individually

and through family-controlled and owned corporations. The Division argues that it is clear that these petitioners were acting as a single entity for mutual gain, thus acting in concert.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00.

B. The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale..." (emphasis added).

The third sentence of Tax Law § 1440(7) provides:

> "Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article..." (emphasis added).

C. Petitioners would have this matter decided in their favor based upon a strictly literal reading of 20 NYCRR 590.43(b). This regulation, put forth in question and answer form, provides, in relevant part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law...applied in the case of:
>
> (b) several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?
>
> Answer: The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors."

Petitioners argue, in essence, that the Division may not ignore the existence of the individual persons (or entities) separately holding title to the parcels transferred. Petitioners assert the independent status of each petitioner in arguing that aggregation is not proper. In response, the Division argues that this regulation was intended to afford exemption in cases of

multiple individual transfers of contiguous or adjacent parcels by separate transferors to a common transferee where such transferors were separate in fact and were not acting in common (for example, a co-op developer acquiring an entire city block of properties owned by several separate and independent individuals and/or entities).

D. This case appears, at first glance, to fit within the above regulation. However, upon examination of the facts and circumstances, it becomes apparent that the several transferors, though legally statused as separate entities, cannot be considered separate and independent with respect to the subject transfers. Rather, the transferors (specifically the corporate transferors) appear to be separate in name only, but otherwise remain fully within the control of petitioner B. V. Brooks and his immediate family. The subject parcels were all parts of one residential subdivision acquired, owned and dealt with over a long period of time by B. V. Brooks, corporate entities he controlled and/or members of the Brooks family. It is undisputed that the parcels were placed into the ownership of separate entities and individuals for the sole, albeit legitimate, purpose of providing protection to the entire subdivision against upzoning (i.e., affording protection by the device known as "checkerboarding"). All of the facts surrounding the transfers at issue indicate a commonality of purpose, and there are no significant facts which tend to establish independence of thought, action or control of any of the entities or show any separation, in fact, among the petitioners.

It is noted that the proceeds of the transfers were to be used for "other projects closer to home" (see Finding of Fact "15"). No distinction is drawn that such projects would be undertaken independently and separately by each of the entities and/or by petitioner B. V. Brooks. Rather, the implication is that the proceeds would be used in concert by all of the entities and by Mr. Brooks together for "other projects closer to home" (presumably in Connecticut). The principal reason advanced against aggregation of the consideration received is the fact that four separate corporate entities and petitioner B. V. Brooks were involved as the transferors of record. To apply the described regulation blindly and determine that aggregation, under these facts, is improper would be to create a broad exemption from the gains tax based

solely on the existence (or use) of two or more entities as transferors. In fact, adoption of petitioners' argument would render the gains tax a nullity simply by the structuring of transfers in two steps, the first of which is to make intermediate transfers to wholly-owned entities (exempt as mere "change of identity" transfers per section 1440.5), followed by subsequent transfers by these entities to the initially intended transferee, each for less than $1,000,000.00 (exempt per section 1443[1]). Creating such a broad exemption simply by the use of two or more intervening entities could not have been intended (Matter of 307 McKibbon Street Realty Corp., Tax Appeals Tribunal, October 14, 1988). The approach of looking through the transferring entities to establish the beneficial ownership interests has been well established as the proper focus of the tax (Matter of 307 McKibbon Street Realty Corp., supra; Matter of Robert A. Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972). Perhaps most telling in this matter is that petitioner B. V. Brooks made an affidavit claiming exemption on the transfers of certain of the subject lots in 1986 (see Findings of Fact "9" and "10") as being "mere changes of identity with no change of interest". This position is completely inconsistent with respect to the transfers at issue herein and the current claim of "independence" among the transferors.

E. Finally, it is noted that petitioners cannot escape gains tax liability under Tax Law § 1440(7) simply by filing a sworn statement that the transfers were not pursuant to a plan to effect by partial or successive transfers a transfer which would otherwise be subject to the tax (Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354). On balance, petitioners have failed to establish that an individual and separate group of owners transferred individually-held parcels to a common transferee. Rather, the facts reveal a commonality of action and control within a family group of corporations, leaving aggregation appropriate under Tax Law § 1440(7). Petitioners thus have failed to establish entitlement to the exemption sought and the Division's denial of refund as claimed was appropriate.

F. The petitions of B. V. Brooks, Brooks, Torrey & Scott, Inc., Rainbow Capital, Inc., Westbrook, Inc. and Westfair, Inc. are hereby denied and the Division of Taxation's denial of

petitioners' claim for refund is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE